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In The

SUPREME COURT of the UNITED STATES

October Term, 1968

No. 575

STATE OF WISCONSIN,

Respondent,

vs.

MICHAEL D. PRESTON,

Petitioner.

BRIEF OF RESPONDENT IN OPPSITION TO PETITION FOR WRIT OF CERTORARI

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NO. 575

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The State of Wisconsin, Respondent, by its attorneys Rudolph P. Regez, Counsel for the Board of State Bar Commissioners, and Warren H. Resh, Special Counsel for the State Bar of Wisconsin present this brief in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Wisconsin by Michael D. Preston, Petitioner.

OPINIONS BELOW

As indicated in the Petition for a Writ the judgment of the Wisconsin Supreme Court is officially reported in 38 Wis. (2) 582 and unofficially in 157 N. W. (2) 615.

However, we call attention to the fact that the above judgment was modified on June 28, 1968 on Petitioner's motion for rehearing. The judgment as modified is reported in 159 N. W. (2) 684, but at this time is not in the official Wisconsin Reports, although it is set forth at pp. 17-21 of the Petition herein.

JURISDICTION

The Respondent raises no question at to the jurisdiction of this court to consider a Petition for a Writ of Certiorari by a disbarred attorney alleging violations of his rights under Article XIV, Sec. I, United States Constitution, but as is amply shown by the judgment of disbarment as amended on Petitioner's motion for rehearing no constitutional rights of the Petitioner were violated.

QUESTION PRESENTED

Was the Petitioner denied due process and equal protection of the law in an original action for disbarment in the State Supreme Court where the court made it clear that its order for disbarment was based upon proof of the allegations by clear, satisfactory, and convincing evidence, even though the referee appointed by the court to conduct the disbarment hearing had indicated that his findings were based upon the preponderance of the evidence?

REASONS FOR DENYING THE WRIT

I.

DISBARMENT IS AN ORIGINAL PROCEEDING IN THE WISCONSIN SUPREME COURT AND WHILE A REFEREE APPOINTED TO CONDUCT THE HEARING MAY MAKE RECOMMENDATIONS THE ISSUE TO BE DECIDED BY THE COURT IS NOT WHETHER THE REFEREE'S FINDINGS ARE SUPPORTED BY THE PROPER QUANTUM OF EVIDENC

In the Wisconsin Supreme Court's order on motion for rehearing the court emphasized the fact that the Petitioner here was proceeding upon the misconception that the court reviews the findings of the referee and applies an evidentiary test to determine whether the referee's findings are supported by the proper quantum of evidence and stated that this is not the correct test. See p. 18, Petitioner's Brief and 159 N. W. (2) 684.

The court then went on to say at the same page:

"A disciplinary proceeding is brought as an original action in this court, and the function of the referee is that of a special master appointed to conduct a hearing under the jurisdiction of this court. While the recommendations of the referee are given consideration, we look to the record and transcript to determine whether the facts apparent therein warrant some form of discipline. To evidence revealed in the record, we apply what this court has referred to (*Madison v. Geier* (1965), 27 Wis. 2d 687, 135 N. W. 2d 761) as the middle burden of proof."

This, of course, is consistent with Sec. 256.28 (12) Wis. Stats., which provides in part with reference to the referee's duties:

> "Upon the filing of the defendant's answer the supreme court shall appoint a referee to hear the cause and to report *his* findings to the court, together with *his* recommendations as to the judgment to be made." (Emphasis added)

The referee is not the court but a mere arm or agency of the court appointed by it to assist the court with whom the ultimate responsibility over the practice of law is vested.

> *State ex rel. Reynolds v. Dinger* (1961) 14 Wis. (2) 193, 109 N. W. (2) 685
>
> *State ex rel. State Bar v. Keller* (1961) 16 Wis. (2) 377, 114 N. W. (2) 796 (1963) 21 Wis. (2) 100, 123 N. W. (2) 905

Indeed the supreme court may not abdicate its responsibility with respect to regulation of the practice of law or delegate it to others. As was said in the case of *In re Cannon* (1932) 206 Wis. 374, 379, 240 N. W. 441, a case which involved the validity of a legislative attempt to restore the license of a disbarred attorney:

> ". . . We easily subject ourselves to the criticism of usurping power where by our decision the power is committed to the judicial rather than the legislative department of government. However, we may as easily subject ourselves to the criticism of timidity were we to betray a disposition to avoid responsibility. The usurpation of power is not more culpable than the abdication of responsibility."

Thus we are concerned here not with the findings of the referee or his recommendations all of which are advisory only. Rather we are concerned with the findings and order of the supreme court itself. It is not sitting as an appellate court to pass upon alleged errors of the referee. Instead it is sitting as a court of original jurisdiction, and it may or may not follow the findings and recommendation of the referee it has appointed to hear the matter. See for example *State v. Maddock* (1940) 234 Wis. 441, 291 N. W. 347, where it chose not to do so, saying:

> ". . . We have so many misgivings concerning the truthfulness and credibility of the complainant, upon whose testimony this proceeding is principally based, that we cannot approve of the recommendations of the referee."

II.

STATEMENT OF WISCONSIN SUPREME COURT THAT ITS CONCLUSIONS ARE BASED UPON PROOF OF THE ALLEGATIONS BY CLEAR, SATISFACTORY AND CONVINCING EVIDENCE MUST STAND AS A VERITY HERE

While as previously indicated the Wisconsin Supreme Court made it clear that although it gives consideration to the recommendations of the referee it nevertheless looks to the record and transcript to determine whether the facts apparent therein warrant some form of discipline. The court then stated in unequivocal language the evidentiary test it applied in these words at p. 19 of the Petition herein:

> "While the language used by the referee in the instant case indicated that he relied upon a preponderance of the evidence in making his findings, each of his find-

> ings was scrutinized by this court on the basis of the evidence of record, and the conclusions of this court are based upon proof of the allegations by clear, satisfactory, and convincing evidence. Any statement appearing in the body of the opinion giving the impression that a lesser burden of proof was required by this court in making its determination is erroneous and is hereby modified."

This statement of the Wisconsin Supreme Court in interpreting its own order in binding upon the court here. As was said by this court is *Lathrop v. Donahue* (1961) 367 U. S. 820, 828, in affirming 10 Wis. (2) 230, 102 N. W. (2) 404, relating to the validity of the integrated State Bar established by supreme court order:

> ". . . The Supreme Court of Wisconsin so interpreted its order and its interpretation is of course binding on us."

Likewise the interpretation given to its disbarment order here to the effect that its conclusions were those which it considered to be based upon proof of the allegations by clear, satisfactory, and convincing evidence must stand as a verity here.

III.

PETITIONER'S ARGUMENT THAT HE WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION BY REASON OF AN ALLEGED FINE LEVIED AGAINST HIM IS WHOLLY WITHOUT MERIT

While not mentioned in that part of the Petition relating to "Questions Presented" the Petitioner argues on p. 7 of the Petition that a fine was increased on his motion for rehearing.

In the first place this is not the fact. In the court's initial opinion it was stated: (p. 16 of Petition)

> "... ..that the defendant pay one-half the costs and expenses of this proceeding, which shall include fees and disbursements of the referee, attorney for the plaintiff, court reporter and printing, but not to exceed a maximum of $5000." (38 Wis. (2) 582, 589)

On motion for rehearing the court stated at p. 21 of the Petition, 159 N. W. (2) 684, 686:

> "... . Inasmuch as this court previously determined that a proper assessment of the costs against the defendant would be the sum of $5000, and the costs exclusive of attorney's fees are substantially in excess of that figure, we reaffirm that portion of the mandate assessing costs in the sum of $5000."

The court did omit from its second order the taxation of attorney's fees because not authorized by statute. However, nothing whatsoever was said about a fine in either the original opinion or in the opinion on rehearing, although a fine could have been assessed against the Petitioner under Sec. 256.28 (14) Wis. Stats. relating to dis-

ciplinary proceedings and which reads so far as material here:

> ". . . If the judgment is against the defendant, all or part of the costs may, in the discretion of the court, be charged to him, in which case they shall, together with any fine so adjudged, be collected by the district attorney of the county where the defendant resides, and by him paid into the state treasury."

Thus the Petitioner clearly misstates the facts when he argues on p. 7 of the Petition that the fine was increased on rehearing.

Since there simply was no fine any argument that the fine was increased cannot possibly raise a constitutional question.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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